No. 44,365-01-B

Ex Parte	}	181st District Court
	}	of
ERNEST LOPEZ	}	Potter County, Texas

HABEAS COURT'S FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 44,365-01-B

Ex Parte	}	In the 181st District Court
	}	of
ERNEST LOPEZ	}	Potter County, Texas

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ERNEST LOPEZ	}	**Potter County, Texas**

CLAIMS UNDER PETITION

Applicant claims in his ***"Petition for Post-Conviction Relief Pursuant to Tex. Code of Crim. Proc. Art. 11.07"*** that:

1. Trial counsel provided ineffective assistance of counsel,

2. That appellate counsel provided ineffective assistance of counsel on appeal, and

3. That he is actually innocent.

PROCEDURAL AND TRIAL HISTORY

1. Petitioner was indicted on October 3, 2001 for Aggravated Sexual Assault of Isis Vas (IV), a child six months old, in Cause No.44,365-B

2. On the same date Petitioner was indicted for Capital Murder of Isis Vas in Cause No. 44,366-B.

3. The State elected to try the Petitioner for Aggravated Sexual assault first and gave notice that in the event of a

conviction they intended to introduce evidence of the death of the child at punishment. *See "State's Original Notices Under 37.07, Section 3(a)& (g) of the Texas Code of Criminal Procedure, and Rules of Evidence 404(b) and 609(f)"*

4. During the trial held before a jury the State presented expert witnesses Michelle Gorday (Gorday), a Sexual Assault Nurse Examiner (SANE) who testified that her examination of the child's genitalia revealed evidence of sexual assault and Dr. Eric Levy, the on duty pediatric critical care physician who testified that he concurred with Gorday as to her conclusions.

5. The defense presented no expert witnesses to counter the State's evidence.

6. Petitioner was convicted on April 21, 2010 of Aggravated Sexual Assault as charged in the indictment.

7. During the punishment trial the State presented evidence as to the child's death and the cause of death through two expert witnesses: Dr. Eric Levy and Dr. Jody McLain the forensic pathologist. They were the only witnesses presented by the State at punishment.

8. Defense counsel presented no expert witnesses to counter the State's evidence of cause of death.

9. The jury assessed punishment at imprisonment for sixty(60) years.

APPELLATE HISTORY

1. After conviction, R. Walton Weaver was appointed to represent Petitioner on appeal.

2. Petitioner's issues on appeal were legal and factual insufficiency of the evidence, error by the trial court in conducting the punishment trial without a defense expert and ineffective assistance of counsel during the punishment phase. HR Vol 19, p. 120

3. The conviction was affirmed by the 7th Court of Appeals, Amarillo, Texas. No Petition for Discretionary Review was filed. See Court of Appeals opinion in AppR

POST-CONVICTION HISTORY

1. Petitioner's ***"Petition for Post-Conviction Relief Pursuant to Tex. Code of Crim. Proc. Art. 11.07"*** was filed on August 8, 2006.

2. Issue was joined by the State by the filing of several answers. There are no prior applications for post-conviction writs of which this court is aware.

3. The Honorable John Board who had presided over the trial determined that there were unresolved factual issues material to the legality of applicant's confinement. Those issues were as follows: (1) Did Applicant receive effective

assistance of trial counsel; (2) Did Applicant receive effective assistance of appellate counsel; and (3) Is Applicant actually innocent?

4. Senior District Judge Dick Alcala was assigned to conduct an evidentiary hearing and to prepare findings of fact and conclusions of law.

5. Judge Alcala presided over the evidentiary hearing conducted September 21, 22, 23, 24, 25, 26, 28, 29 and 30, 2009.

6. In addition to hearing testimony from lay and expert witnesses, the court took judicial notice of the trial record in the underlying Cause No. 44,365-B, the habeas writ record in Cause No. 44,365-01-B, the clerk's record and the appellate record Cause No. 07-03-0251-CR.

7. At the conclusion of the habeas hearing recess was taken and counsel were allowed to supplement the habeas record with affidavits of witnesses who did not appear live at the habeas hearing.

8. In making findings reference to the record will be noted as "TR" to designate the trial record, "HR" to designate the habeas hearing record and "AppR" to denote the appellate record.

ACTUAL INNOCENCE CLAIM

Preliminary Discussion of Actual Innocence Claim

A conviction is constitutionally invalid if a claim of innocence is established by clear and convincing evidence and is combined with a constitutional error. *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)

In our present case Applicant claims constitutional error due to the ineffectiveness of trial counsel resulting in his conviction when he was actually innocent. The burden is on Applicant to show by clear and convincing evidence that it is more likely than not that no reasonable juror would have convicted him.

The question is whether Petitioner has shown by clear and convincing evidence that because of the constitutional error the conviction of an innocent person has resulted. The habeas court must weigh the new evidence with the evidence presented at trial and determine whether it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Schlup, supra, Ex parte Elizondo,* 947 S.W.2d 202 (Tex. Crim App. 1996), *Ex parte Tuley,* 109 S.W.2d 388 (Tex. Crim. App. 2002)

The entire discussion centers on medical expert testimony to resolve at guilt innocence whether the injuries observed indicate a sexual assault or a natural process. Likewise, the issue at punishment is whether the death of the child was the result of an intentional act or natural causes.

At the habeas hearing the court received evidence from a number of

expert witnesses presented by the State other than those presented at trial to counter Petitioner's medical experts. Indeed, some of the State's trial witnesses testified again at the habeas hearing. The State presented the following expert witnesses live or by affidavit in addition to the testimony of the experts presented during the habeas process: Dr. Nancy Kellogg, Dr. Harry Wilson, Dr. Randall Alexander, Dr. Wilbur Smith, Dr. Carmen Werner, Dr. Shu Shum and Dr. Alan Cohen. Their testimony and affidavits are part of the record of this cause and have been reviewed by the Court. However, the law, in making an actual innocence evaluation, requires the habeas court to compare only the testimony heard at trial with the new (habeas) evidence. Therefore, although the habeas court has reviewed the State's additional expert testimony only the habeas evidence and the trial testimony are analyzed in making its recommendation. *Ex parte Elizondo,* 947 S.W.2d 202 (Tex. Crim. App. 1996)

Further, it is important to note that the testimony of the State's experts at trial testified as to the issue of sexual assault at guilt innocence and as to cause of death at punishment. The evidence received during the habeas hearing, of course, was not a bifurcated process and the testimony pertinent to issues of sexual assault and cause of death are combined. Some of the testimony, such as the diagnosis of coagulopathy, is relevant to both issues.

Further, Petitioner and Respondent have filed *Daubert* challenges to each other's medical experts. However, in assessing the adequacy of petitioner's showing the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was

either excluded or unavailable at trial. *Schlup*, supra. p.328 Nevertheless, the Court has made a evaluation of the testimony to determine basic issues of relevancy, reliability and usefulness to a jury.[1]

Finally, there were several witnesses presented at the habeas hearing and/or by affidavit whose testimony the court does not discuss. In the Court's opinion the testimony and the issues discussed in this recommendation are relevant in resolving the habeas issues.

Sources of Findings - Actual Innocence Claim

In making its findings the court used the trial court record (TR), the habeas hearing record (HR), the appellate record (AppR), in particular the appeals court's rendition of the facts stated in their opinion, and affidavits filed among the record.

Finding of Fact – Actual Innocence Claim

Court of Appeals Summary of Underlying Facts

The habeas court adopts as its findings the following factual recitation of the 7th Court of Appeals as set out in their memorandum opinion affirming the conviction:

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[1] The only area the habeas court had concern in evaluating the testimony of the habeas medical experts was the effect, if any, of the spider or insect bites the child was reported to have suffered a few days prior to her admission to the emergency room. Witnesses, including Petitioner and Dr. Vas, the child's mother, reported the child had spider or insect and some of Petitioner's medical experts attributed them as possible causes of the child's medical condition. In the habeas court's opinion these experts did not make a convincing or sufficient connection between the bites and the diagnosis in order to be reliable. *Daubert v. Merrell Dow Pharmaceutical, 509 U.S. 579, 113 St. Ct. 2786 (1993), Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App 1992)*

"The victim in this cause was a six-month-old child, I.V. who was the daughter of Dr. Veronica Vas (Vas). In August of 2000, appellant's wife (DeAnn) started providing child care for the Vas' three children including I.V. On October 25, 2000, which was a Wednesday Vas dropped her children off with DeAnn and returned later than evening around 10:00 p.m. Vas and her children stayed with appellant and his family overnight. Vas was working at the emergency room in Dumas, Texas, and was working late hours; so, she would return to appellant's house and sleep there until her next shift.

During the evening of the 25th, DeAnn had occasion to change I.V.'s diaper. She testified that she did not notice anything unusual with the infant's vaginal or anal areas at the time. Around 3:00 a.m. the next day, DeAnn, appellant, and Vas were awakened by I.V crying. The child did not appear to be breathing right and DeAnn tended to her until about 6:00 a.m. Later that morning, appellant and Vas left to go to work. Both had to be at their respective jobs by 8:00 a.m. DeAnn then gathered her own two children and Vas' three children and left for the house of Marry Guerrero (Mary) DeAnn's sister. After she arrived, DeAnn and her sister left to clean Vas' house. They were there for approximately four hours. While at Vas' home, Mary changed I.V's diapers and noticed nothing suspicious with the child's vaginal and anal areas. Later, DeAnn took her sister home and returned to her own home where the children fell asleep.

Around 5:00 p.m., appellant came home. Vas returned approximately two hours later and went to sleep on the floor with her other two children. I.V slept on the loveseat in the same room with her mother. Prior to going to bed Thursday night, I.V. had required changing and DeAnn did not notice any trauma to the child's

genital or anal areas. The next day, Friday, Vas got up, as did appellant and left for work. DeAnn stayed behind to watch the children. During the day, DeAnn again failed to notice any trauma to the child's vaginal and anal regions. Appellant came home at noon and remained while Vas arrived there around 5:00 p.m.

On Friday at 7 p.m., Vas left for Michigan. Her children stayed in the appellant's house. At the time, nothing had alerted either Vas or DeAnn to any problems with I.V. regarding her genitalia or anus. In fact, DeAnn recalled a specific incident around 8:00 p.m. where she changed the baby's diaper and had to thoroughly clean the vaginal and anal area. At that time, no trauma appeared to her. Appellant had left the house around 6:00 p.m. to go to a church function and did not return until 10:00 or 11::00 p.m. When he got home, appellant watched T.V. in the living room until he fell asleep. I.V. was sleeping on a sleeping bag in the living room where appellant slept.

On Saturday morning, October 28th, around 10:00, DeAnn left with two of the children to go shopping. I.V. remained with appellant. DeAnn returned to the house at noon and learned that appellant and I.V were at the hospital.

On cross-examination, DeAnn represented that when I.V. was brought to her house on Wednesday, October 25th, she noticed unusual looking bumps "all over her head- her face- forehead and a little bit on her head." The bumps were "raised and… dark looking." I.V. was also acting lethargic and had a fever. She asked Vas about the bumps, but they did not concern Vas enough to warrant medical attention. So too had she noticed bruises on the infant's chest and a change in the color of the child's stool. It became black in color. Also, the child ate very little from Wednesday until Sunday, slept a lot, and cried when her diaper was changed.

DeAnn also represented that I.V. fell off the couch on Friday night and conceded that she lacked the qualification to give opinion about the existence of trauma to the infant's vaginal and anal region.

At the trial, Joe Neely, an employee with the City of Amarillo Fire Department, testified to receive a dispatch on Saturday, October 28, 2000, at 11:00 a.m. He was directed to appellant's house. Upon entering the house, Neely found that I.V was not breathing. His partner, Jeff Greenly, also noticed that the infant's pulse was very weak. Immediately, the pair administered CPR. Within minutes, paramedics arrived and took charge of the situation. Neely, in his assessment of the child, noticed bruising "about [I.V.'S]. . .head, . . . neck, and shoulders and chest. But nothing that — needed our attention as far as medical treatment."

One of the paramedics, Troy Lightsey (Lightsey), described how appellant told him that I.V. had received several spider bites and was congested. After he had received this information, Lightsey continued to the room where the child was being treated. He testified that he did not see any bites nor was treatment required for any bites or for congestion. However, he saw "some bruising around the upper part of the body and the neck" of the infant. Lightsey also convinced appellant to ride with the child in the ambulance to the hospital. Then, he contacted dispatch to have the police meet them at the hospital. On cross, Lightsey admitted that he did not have a medical opinion regarding the "nature, seriousness, origin or — or age" of the bruises on the I.V.'S chest.

Melissa Fanelli, an emergency room nurse trained as a sexual assault nurse, testified that she was on call the morning I.V. arrived at the hospital. Upon the arrival of I.V., she assisted in

administering medications to the babe and in placing a catheter into the infant's urinary tract. While attempting the procedure, Fanelli saw "bright red bleeding" inside the vagina which meant the child had been sexually assaulted. The police were notified of this. Fanelli also testified that this type of injury could not have been done by the baby, by any medical condition, or by cleaning the child with pre-moistened wipes or a wash cloth. Nor could the injuries have been caused accidently given their severity. In her opinion they were the result of forceful penetration.

Becky O'Neal, who was originally assigned the primary care nurse for I.V., also saw the fresh bleeding and commented that "to see fresh blood trickling out of a six-month-old was very significant to me." So too did she state: ". . . I did see some trauma to her posterior fourchetta at the time, which to me, means that something – some kind of forceful penetration has taken place, so we back out of the picture and turn it over to the Sexual Assault Nurse Examiner."

In turn, the sexual assault nurse examiner[2] (Michelle Gorday) opined, much like Lightsey, that the injuries suffered by I.V. were due to forceful penetration by an object and that the bruising and abrasions had occurred within the last 24 hours. So too did she say that the bleeding had been caused by injuries that occurred approximately 30 minutes prior to the child's arrival in the emergency room and that they were consistent with those from the sexual penetration of the female organ.

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[2] *Sexual Assault Nurse Examiner Michelle Gorday's name was included parenthetically above by the undersigned habeas judge because the Court of Appeals did not identify her by name as the nurse who performed the sexual assault examination but clearly the record reflects that it was Ms. Gorday.*

Next, Officer Justin Taylor testified about his communication with the appellant at the hospital. Appellant told him that after DeAnn left the house, he went to change I.V. and later decided to giver her a bath. He turned away for a few minutes to clear off a space to wash the child and when he turned back he noticed the baby had stopped breathing. He gently patted I.V. on the bottom, turned her over and slapped her on the face, and panicked and started shaking the infant. Appellant then took I.V. to another room and laid her on the bed, began CPR, and phoned 911. The officer was also informed by the appellant about the child's discharge was sticky and rank the night before and that he was unable to clean the baby completely. The officer also related how appellant told him that 1) appellant and DeAnn noticed "marks around [the child's] face, neck and chest area," and was told that these were spider that were healing and 2) the child had been having problems breathing and that they had given her breathing treatments. According to the officer, appellant showed proper concern for the infant and was cooperative. Furthermore, in his report, Taylor had indicated that he had spoken to the sexual assault nurse about the child's injuries and that they were purportedly moderate to the vaginal area and minor to the anal area.

In testifying, Detective Donald Moore related his conversation with appellant. According to the officer, appellant appeared to be uttering "defensive statements as to medical reasons why the baby had had difficulty." So too did appellant appear scared and upset and commented that "maybe [he] shook the baby too hard." Unlike what he told another officer, however, appellant told Moore that he had decided to change the baby when he noticed "a spot" on her nightie. He also "noticed some strange colored spots on the diaper" and cleaned her "real well" with baby wipes. The areas cleaned included "her creases and the private areas." Appellant

then purportedly left I.V. in the crib for about ten minutes. When he returned, he picked the child up and "noticed she was real limp and . . . her eyes were dilated." Appellant then stated that he shook her but failed to get a response; he also shook her legs again to get her to respond" and took her to the bathtub to run water over her. The child continued to evince no response, according to appellant. And, as he walked with her to a bedroom, he "shook her some more." Upon arriving in the bedroom, appellant described how he laid her on the bed and listened to her heartbeat. It was purportedly fast, and the infant was not breathing. He then began CPR and noticed air and mucous come out of her mouth and nose. Though appellant said that he was able to clear her airways, she "wasn't any better." So, he eventually called 911.

Garon Foster, a DNA technical leader with the Bexar County Criminal Investigation Laboratory in San Antonio, Texas, testified that the lab had received items of evidence from appellant and I.V. The items consisted of soiled diapers, a pair of appellant's underwear, a pair of his shorts and a T-shirt. A small amount of human blood was found on one of the diapers. Skin cells were found in the underwear. Erin Reat, another forensic scientist in the San Antonio lab testified that he conducted DNA analysis on the cells from the underwear. He tested three different cuttings from the appellant's underwear. One cutting held DNA material matching that of appellant. Another had DNA material matching that of appellant and I.V., while the third held DNA material of an unknown male.

Next, Dr. Eric Levy, a pediatric critical care physician, testified that I.V.'S "genital perineal and rectal areas- - that whole area- had been traumatized" and that the injuries were "serious- and violent for there was, in [his] opinion, extensive

bruising [a]nd. . . significant tearing of the posterior vaginal wall." He also opined, that the injuries occurred within an hour before I.V. arrived at the hospital and that they could not have been caused by cleaning the baby during a diaper change or by the baby being dropped on this area.

The defense recalled DeAnn to testify. While being questioned, she said that due to the bruising on the baby's chest, Vas did not take I.V. to the doctor the night the baby awoke crying and with a fever. Vas purportedly "didn't want anybody to think she was abusing her child." So too did she state that Vas spent very little time with I.V. and that when I.V. arrived on Wednesday evening and during her stay with them, the child lacked energy, slept a lot and was listless." AppR, HR Vol. 19, p. 121-127

Trial Medical Expert Testimony

Michelle Gorday

The Court finds that Michelle Gorday testified as follows during the guilt innocence trial:

- That she is a licensed and registered charge nurse at Northwest Texas Hospital with training in the areas of advanced cardiac life support, a provider and instructor of the, an emergency nurses pediatric course provider and CPR provider. Further she has experience as an Intensive Care Unit nurse. She served as the coordinator of the Sexual Assault Nurse Examiner program at Northwest Texas Hospital. Additionally, she served in the armed forces as a Lieutenant Commander in the Navy Nurse Corps from which she received an honorable discharge.

- That she was the on duty sexual assault nurse examiner on duty when the child was brought into the emergency room. She was summoned when two other nurses (Fanelli and O'Neal) who were in the process of inserting a catheter observed blood in the genital area of the child. Gorday's observation of the outer portion of the vagina (labia majora) revealed no injury but upon separating the outer vaginal lips she observed trauma to the inner portion of the vagina (labia minora). TR Vol. 5, p. 113 and p. 120

- That the child's genitalia revealed evidence of active bleeding "that hadn't quite clotted yet." TR Vol. 5, p. 103.

- That she observed a "laceration" which extended from the outside of the posterior fourchette all the way back to where it pushes up against the hymen. TR Vol. 5, p. 124-132

- That the laceration was caused by severe force that caused trauma the likes of which she had not ever seen in her career. TR Vol. 5, p. 153

- That the trauma was consistent with sexual penetration and not the result of an accident. TR Vol. 5, p. 163.

- That she testified that the injuries were "very fresh" occurring from 30 minutes to an hour before the child was brought to the emergency room. TR Vol. 5, p. 160

- That further examination revealed abrasions to the perineal area including a swollen anus and the presence of some green liquid stool. TR Vol. 5, p. 141-142

Dr. Eric Levy

The Court finds that Dr. Eric Levy testified as follows during the **guilt innocence trial:**

- That he is a pediatric critical care physician

- That after receiving his undergraduate degree, attended and completed medical school. He then competed his residency in pediatrics, was licensed to practice medicine in the State of Texas and Georgia and subsequently became board certified as a pediatrician and in pediatric critical care. TR Vol. 6, p.158-159

- That his sub-speciality as pediatric critical care medicine entails care of children who either have a life threatening illness or injury or potentially life-threatening illness or injury. TR Vol. 6, p.159-160

- That the majority of his time is spent in the Pediatric Intensive Care Unit with some time in the Emergency Room. TR Vol. 6, p.160

- That he was summoned to the Emergency room in regards to a six month old being transported by EMS in full arrest. TR Vol. 6, p.161

- That he initially examined the child upon presentation to the emergency room and examined the genital trauma after the sexual assault examination was conducted.

- That he was not present during the sexual assault examination but "concurred with the examination from the SANE nurses – that – the genital perineal – the genital perineal and the rectal areas – that whole area – had been traumatized." He further was of the opinion "that those areas had been penetrated." TR Vol. 6, p.165-166

- That because of the "fresh bruising" the clotting and "the edges are 'clean' the "injury is very recent – more closer to in the minutes to hour range more than anything else." TR Vol. 5, p.173-174

- That the injuries could not have happened from a person cleaning feces from the child. TR Vol. 5, p. 181

- That he observed "small, numerous bruises" of "varying ages" on the child's face, chest, torso, and legs which in his opinion she had been "traumatized repeatedly, obviously at different times." TR Vol. 5, p. 190

- That the injuries could not have been done accidentally or unknowingly and attributed them to intentional child abuse. TR Vol. 5, p. 193

The Court finds that Dr. Eric Levy testified during the **punishment trial** as follows:

- That the child was brought into the emergency room with trauma that he described as "lethal injuries." TR Vol. 8, p. 22

- That he observed multiple bruising of varying ages that is descriptive of child abuse. TR Vol. 8, p. 23

- That the bleeding in the retina and the bruises led him to believe that this was a case Shaken Baby Syndrome or battered child syndrome. TR Vol. 8, p. 23

- That the observed trauma resulted in full cardiac arrest and there were no chances to save the child. TR Vol. 8, p. 23

- That he was of the opinion that what his observations of the trauma to the "genital, urinary, the vaginal, rectal," the bruises, the head injury that resulted in swelling and bleeding in the brain, retinal hemorrhage and an old fracture of the clavicle, reflected repeated trauma of varying ages. TR Vol. 8, p.24-225

- That his conclusion is that the child was a victim of Shaken Baby Syndrome as a result of multiple injuries and the final injury was a lethal brain injury that resulted in her death. TR Vol. 8, p. 27

- That based on the literature injuries such as these are perpetrated by a single person. TR Vol. 8, p. 27-28

Dr. Jody McClain

The Court finds that Dr. Jody McClain testified at the **punishment trial** as follows:

- That she is a medical examiner with Dallas County.

- That she graduated from the University of Oklahoma, School of Medicine in 1983 with a medical degree after which she did an anatomic and clinical pathology residency at the Oklahoma teaching hospitals. TR Vol. 8, p. 55

- That she did a one year fellowship at Indiana University in forensic pathology and spent four years with the Medical Examiners office in Washington, D.C.
  TR Vol. 8, p. 55

- She is licensed physician in Texas, Oklahoma and Indiana. TR Vol. 8, p.56
- That she performed an autopsy on the body if Isis Vas on October 31, 2000. TR Vol. 8, p. 57

- That external observation of the body revealed bruises on the face, forehead, hemorrhage in the inside portion of the right upper eye lid, contusions on the tip of the nose, the right side of head and an abrasion to the back of the head. TR Vol. 8, p. 59

- That she also found a contusion to the left side of the chest. Also she observed contusions in the front hip region. TR Vol. 8, p. 60

- That in the genital area she found a laceration which she described as a tear of the skin due to blunt trauma of the opening of vagina at the bottom portion along with a hemorrhage surrounding the laceration. TR Vol. 8, p. 60

- That she also found some contusions around the entrance of the anus. TR Vol. 8, p. 60

- That she found contusions to the right side of the upper back, the mid portion of the back, the outer portion of the left lower leg and the right and left thighs. TR Vol. 8, p. 61

- That upon examination of the head after reflecting the scalp she found subscapular hemorrhage. Examination of the brain area revealed subdural hemorrhage. TR Vol. 8, p. 62
- That subdural hemorrhage occurs in injuries such as this when bridging veins that connect to the dura of the brain break as a result of shaking. TR Vol. 8, p. 62

- That the injuries of this type are consistent with Shaken Baby Syndrome. TR Vol. 8, p. 62

- That microscopic examination of sections of skin revealed recent hemorrhage in the soft tissue of the vagina, of the sub-scalp area, of the dura and of the left and right eye. TR Vol. 8, p. 63

- That observation of red blood cells under the microscope leads to the conclusion that the injuries are recent; meaning within that day of death or injury. TR Vol. 8, p. 63

- That though there was pneumonia present that would be consistent with the child having been on a respirator for life support she does not know whether it was present in the 24 hours prior to death. TR Vol. 8, p. 65

- That Isis Vas died as a result of multiple blunt force injuries. TR Vol. 8, p. 67

HABEAS (NEW) EVIDENCE

Dr. Jan Edward Leetsma

The Court finds that Dr. Jan Edward Leetsma testified at the habeas hearing as follows:

- That he is a neuropathologist, who received his medical degree at the University of Michigan and underwent training in general and anatomic pathology at the University of Colorado Medical Center and completed his residency at Albert Einstein College of Medicine in New York in neuropathology. He is Board Certified in Anatomic and Neuropathology. HR Vol. 2, p. 111

- That he is the author of a medical text entitled *Forensic Neuropathology, 2nd Ed*. Widely used by physicians in the field of pathology and neuropathology. HR Vol. 2, p. 111-112

- That he has for the span of his career involved himself in cases of children who have died as the result of brain damage. HR Vol. 2, p. 112

- That in this case he used medical records and autopsy slides in arriving at his conclusions. Also he reviewed microscopic slides of tissue taken at autopsy that are "direct unfiddled with objective material" by which to arrive at a diagnosis. HR Vol. 2, p. 114

- That based on his examination of the autopsy slides in his opinion the child died from the effects of severe pneumonia and pulmonary failure. HR Vol. 2, p. 114

- That his review of the kidney slides revealed "interstitial nephritis or a chronic inflammatory process that had been there at least 42 hours before admission to the hospital. HR Vol. 2, p. 119 and p. 122

- That his examination of the lung tissue slides revealed severe extensive pneumonia in the air passages and the tissue that was two days to a week old before admission to the emergency room. HR Vol. 2, p. 131

- That his examination of the red blood cells and macrophages (scavenger cells) present and their characteristics determine the age and date of the pneumonia. HR Vol. 2, p. 130-131

- That a normal lung looks like a "kitchen sponge, mostly air," and in this case "the majority of the lung tissue didn't look like that" instead looked like "beefsteak" which indicates few air spaces. HR Vol. 2, p. 127 and 131

- That though "ventilator pneumonia" can result by being hooked up to a ventilator to assist in breathing, as in this case, in his opinion the pneumonic process began up to a week before. HR Vol. 2, p. 135

- That his examination of Slide 7 and 8 appear to be scalp tissue but the important thing is the presence of macrophages (scavenger cells) which take about a week to appear,

therefore something has injured the scalp tissue a week or more from the time of death. HR Vol. 2, p. 139-140.

- That his review of the brain slides revealed damaged nerve cells that are normally blue but appeared red because of the lack of blood supply, oxygen or glucose. Also, there was edema or tiny hemorrhages near the surface of the brain. Although unable to say what caused this brain death problem it is consistent with respirator brain phenomenon and the process of brain death. The presence of perivascular hemorrhages do not mean that there are contusions or bruises on the brain. The presence of subarachnoid hemorrhage, as this case, on the surface of the brain is very common in the respirator brain phenomenon. He cannot infer trauma from the slides. HR Vol. 2, p. 142-146

- That review of the dura slides (Exhibit 5) reveals an old subudural hematoma in the order of months and a recent one three to five day in age. HR Vol. 2, p. 149-150

- That this is so because of the presence of coagulated protein that is red blood cells with coagulum. It takes three to four days for blood cells to get that point. HR Vol. 2, p. 150

- That review of Exhibit 6 reveals the edge of a blood clot interface with dura which is indicative of earliest reactions of blood cells. The gradual changing of colors of the red cells allows you to age and date them. Because of the appearance of the cells and the presence of macrophages the

cells are consistent with an age of three to five days. HR Vol. 2, p. 154-155

- That based on the lab studies and evidence of the child's condition before admitted in his opinion the child was ill due to respiratory problems complicated by coagulopathy. HR Vol. 2, p. 161

Debbie Jenkins

The Court finds that Debbie Jenkins testified as follows at the habeas hearing:

- That she has been employed as professor of pediatric nursing at Collin College, Collin County, Texas since 2005

- That she attained a BS in nursing from West Texas A&M 1989 and a master's degree in nursing from West Texas A&M in 1994.

- That she is enrolled in doctoral studies in nursing education at Capella University. HR Vol. 7. p. 32

- That her responsibilities include supervision of clinical nursing students at Children's Medical Center, Dallas, Tx.

- That she conducted sexual assault examination of children when she was pediatric nurse in Northwest Texas Hospital, Amarillo, Tx from 1984-2002. HR Vol. 7 p. 323

- That she trained as sexual assault nurse examiner and was credentialed by the medical staff at Northwest Texas Hospital as a (SANE) sexual assault nurse examiner and performed exams from 1990-1993. HR Vol. 7 p. 323

- That Michelle Gorday trained under her as a preceptor in the sexual assault nurse examiner program. HR Vol. 7 p. 323

- That she has testified on behalf of State in sexual assault cases in Potter County.

- That she received a call during the trial from the wife of defense investigator Campos in 2003 and was asked to look at the case. HR Vol. 7 p. 324

- That she reviewed sexual assault nurse examiner records overnighted to her. HR Vol. 7 p. 325

- That initially she was puzzled because the history did not seem to match the photographs. HR Vol. 7 p 325

- That she spoke to Investigator Campos and told him that she felt like what she was seeing was inflammation and in her opinion that the child was sick and it did not look like sexual assault. She requested more information. HR Vol. 7 p. 325

- That defense counsel did not ask her to come to Amarillo to testify or to be a consultant. HR Vol. 7 p. 326

- That before the habeas hearing she reviewed the entire medical record from Northwest Texas Hospital and photos from the sexual assault nurse examination that confirmed her initial impressions. HR Vol. 7 p 328

- That the injuries seen on the child are consistent with infection, inflammation and not consistent with sexual assault. HR Vol. 7 p. 328

- That the photographs taken at time of sexual assault examination reveal inflammation just inside the labia majora. HR Vol. 7 p. 334

- That there were no tears evident in area of posterior fourchette. HR Vol. 7 p. 335

- That the area of fossa navicularis that is just beyond the posterior fourchette reveals a black area that appeared to be chronic inflammation. HR Vol. 7 p. 335

- That it is inflammation because the blackened area is consistent to one site and there is no sign of any trauma or tearing in the labia majora. HR Vol. 7 p. 336

- That in an infant this size you would if there had been sexual assault you would expect to see injury to the labia majora before injury to the vestibule that lead to her conclusion of inflammation due to infection. HR Vol. 7 p. 336

- That the hymen is fine and no signs are evident of tearing or bleeding. HR Vol. 7 p. 336-337

- That the photo Petitioner's Exhibit 14 shows nurse examiner putting mild traction mid labia to open up the vestibule which is not what should be done first. HR Vol. 7 p. 333

- That when tissue is friable, it tears and bleeds easily, such as when there is an infection. So when thumbs are pressing and pulling down it can create tears or breaks in the skin. Proper way is to take the labia majora and hold it to pull out and down. HR Vol. 7 p. 338

- That tissue is easy to tear in an ill infant. Even pulling a blanket from under a child too vigorously can cause a tear to posterior fourchette because of its friability. HR Vol. 7 p. 351

- That slides show no tears or rips in the posterior fourchette and the vestibule shows inflammatory changes where the skin integrity is just chopped up from the infection. HR Vol. 7 p. 339

- That Petitioner's Exhibit 18 shows an abrasion that typically can be caused by cleaning or rubbing that would have been simple in this child with the inflamed bottom. This abrasion is 24 to 48 hours old. HR Vol. 7 p. 340-341

- That the area of infection is about a centimeter in width. HR Vol. 7 p. 344

- That Petitioner's Exhibit 24 reveals somewhat of a tear to the fourchette that was not previously there and caused by pulling during the sexual assault exam. HR Vol. 7 p. 351

- That photos of rectal area show inflammation of the kind you see from diaper rash that conforms to the history in this case. HR Vol. 7 p. 358

- That Petitioner's Exhibit 32 shows a worsening in the tear to the posterior fourchette from the earlier picture. HR Vol. 7 p. 363

- That there is no evidence of blunt force trauma. All injuries are from inside out. Blunt force trauma would have damaged the external structure and the hymeneal tissue would have been torn if a male sexual organ or a finger was inserted. HR Vol. 7 p. 365

- That Petitioner's Exhibit 33 reveals examiner injury because of the tearing of the fourchette shown by irregular curve that wasn't present in the previous slide. HR Vol. 7 p. 367

- That tears are minor and no indication on photographs of clear lacerations. HR Vol. 7 p. 367

- That consistent with cleaning on a patient who is very ill. HR Vol. 7 p. 367

- That the child's illness is supported by the medical records indicating high PTT, low hemoglobin and hematocrit and high white blood cell count. HR Vol. 7 p. 368

- That it is commonly known that infectious process can be confused with sexual assault. HR Vol. 7 p. 376

- That she would have given the same testimony had she been called to testify at the trial. HR Vol. 9 p. 387

Dr. Lloyd White[3]

The Court finds that Dr. Lloyd White testified at the habeas proceeding as follows:

- That he is pathologist and serves as deputy medical examiner with the Tarrant County Medical Examiner system.

- The he attained a Bachelor of Science from the University of Tulsa and his medical degree from the University of Oklahoma. HR Vol. 3, p. 8

- That he received post graduate medical specialty training at Baylor University Medical Center, Dallas, and at the University of Texas Southwestern Medical Center Dallas. HR Vol. 3, p. 8

- That he is certified by the American Board of Pathology in anatomic and clinical pathology and the subspecialty of forensic pathology. HR Vol. 3, p. 8

- That he has testified as an expert for the prosecution and sometimes retained by defense. HR Vol. 3, p. 9

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[3] Dr. White refused to be cross-examined on issues that would be relevant in determining whether he has a bias or prejudice against the District Attorney's Office in Potter County concerning matters pertaining to a past prosecution against him by that office. Dr. White asserted a dubious claim based on the 5th Amendment which the habeas Court would have certainly respected if the basis for the claim had been clarified. Therefore, the undersigned habeas judge finds that his testimony is not credible and will play no part in the habeas judge's conclusion and recommendations. The portions of his testimony included in this document are for the Court's edification and to determine whether they wish to consider his testimony despite his refusal.

- That he has extensive experience with sexual assault and personally established a system for conducting sexual assault exams in Denton, Texas. HR Vol. 3, p. 9

- That he was first contacted in the case by defense attorney David Isern. Based on reviewing some materials he prepared a report in the form of a letter in of April 2001. HR Vol. 3, p. 10

- That he met with defense counsel in 2001 or 2002 in Amarillo and during the trip met with Rebecca King regarding establishing a forensic pathology service in Potter County. HR Vol. 3, p. 11

- That he received a phone call from by defense counsel in 2003 and was told that the trial was in progress and he had not been notified in advance. HR Vol. 3, p. 12

- That prior to trial he was not asked to do a complete medical review nor was he retained to testify at trial. HR Vol. 3, p 13

- That the preliminary report that he provided in 2001 stated that child was sick, there was no fatal injury in medical records or the autopsy report and that there had been misdiagnosis based on categorical intuitive deduction. HR Vol. 3, p. 13-14

- That the medical personnel missed the signs of sepsis. HR Vol. 3, p. 15

- That his review of the kidney slides revealed chronic inflammation in the kidney that had been there for several days to several weeks. HR Vol. 3, p. 18-19

- That the review of the skin slide indicated inflammation. There was necrotic debris typical of abscess that had existed for several days and preceded the time that the defendant was with the child. HR Vol. 3, p. 20-21

- That his review of the lung slides revealed pneumonia together with injury to the lining of the air cells resulting in accumulation of protein material that shows up pink on the slides. HR Vol. 3, p. 21

- That he has never seen the type of pneumonia he saw on slides on a person who had been on a ventilator but can't entirely rule out ventilator pneumonia. HR Vol. 3, p. 21

- That the pneumonia seen was several days old and perhaps longer. HR Vol. 3, p. 23

- That on his review of the vaginal slide he observed hemorrhage with inflammation with mixture of cells indicating that the inflammation had more likely than not been there for some period of time but more than 48 hours. HR Vol. 3, p. 23.

- That his review of the photographs of the vagina showed a dark area of discoloration in area of the posterior fourchette which is described in the hospital record and autopsy report as a laceration but he could not see it in the photograph. Rather what he saw what is typical of

inflammation, irritation, perhaps erosion or abrasion of the outer surface of the mucosa. HR Vol. 3, p. 24-25

- That his review of the hospital chart indicated a coagulopathy existed which could make the skin bruise more easily. HR Vol. 3, p. 32-33

- That in his opinion the cause of death was sepsis and pneumonia resulting in hypoxic encephalopathy associated with coagulopathy. There was no indication of a fatal injury. HR Vol. 3, p. 36-37

- That in his opinion shaken baby syndrome is controversial and not substantiated by any kind of scientific evidence. HR Vol. 3, p. 44-45

- That from his review there were no sign of massive head injury. HR Vol. 3, p. 49

Dr. Peter John Stephens

The Court finds that Dr. Peter John Stephens testified at the habeas proceeding as follows:

- That he is a pathologist and forensic pathologist by subspecialty and Board certified in anatomic, clinical and forensic pathology. Vol. 3, p. 80

- That anatomic pathology is study of anatomy of diseased organs. Clinical pathology is study of body fluids.

- That he earned a BS at McGill University, Montreal Canada in 1957.

- That he did a year rotating clinical internship in a hospital in Montreal.

- That he did a two year pathology residency, a one year anatomic and one year clinical residency at the Medical College of Virginia in Richmond, Virginia. He did a two year pathology residency in London, Ontario, Canada.

- That he has practiced in the United State since July 1973 and has performed about 3,000-3,500 autopsies in course of career. HR Vol. 3, p. 82-83

- That he has testified as an expert in general forensic pathology including head injuries in children.

- That he is not being paid for testifying in this case. HR Vol. 3, p. 84

- That his testimony is based upon past medical history, medical records, autopsy report and autopsy slides. HR Vol. 3, p. 85-87

- That from his review of records determined that child's health deteriorated four or five days prior to her death. HR Vol. 3, p. 88

- That the black stool noticed on October 25, 2000 was a danger signal of the first order that indicated blood in digestive system. Other indicators were not taking food or drink,

breathing problems and needing breathing treatments. HR Vol. 3, p 88-89

- That in his opinion the cause of death was a natural death due to a disease process starting in the lungs that revealed a severe pneumonia complicated by disseminated intravascular coagulation. HR Vol. 3, p. 89

- That his review of the skin slides revealed old bruising with presence of hemosiderin which appears in 48 hours to 72 hours. HR Vol. 3, p 93-94

- That his review of the lung slide there is a fairly severe ongoing pneumonia and pus cells indicative of an older process from 48 to 72 hours. HR Vol. 3, p 95

- That in his opinion the pneumonia present preceded hospitalization by a day or two and was far in excess of the ventilator pneumonia normally seen in a patient who has been connected to a ventilator. HR Vol. 3, p. 96

- That his review of the kidney slides indicates the presence of an old chronic inflammation. HR Vol. 3, p. 97

- That his review of the vaginal slides indicated what appeared to be scarring which would have taken from two weeks or months to appear and recent hemorrhage typical in an ongoing chronic inflammatory process. In his opinion the vaginal lesion was not adequately sampled. HR Vol. 3, p 97-98

- That from his review of the brain slides taken during the autopsy there is no convincing evidence of blunt force injury to the head in the autopsy. HR Vol. 3, p. 103

- That a review of the sexual assault photos he was unable to see a laceration but that the area in the posterior fourchette was indicative of either a hemorrhage or necrosis. The photos were not good enough. HR Vol. 3, p. 106

- That the elevated PT reflects that the child had a coagulopathy that preceded her arrival at the hospital by 12 to 24 hours. HR Vol. 3, p. 107-108

- That in his opinion you can get coagulopathy from head trauma but DIC takes at least 8 to 12 hours to set in. HR Vol. 3, p. 109

- That the medical records indicate that she was treated appropriately with fresh frozen plasma for the coagulopathy at the hospital and it is the only reason to give fresh frozen plasma. HR Vol. 3, p 120

- That he does not agree that the child showed features of a battered child. HR Vol. 3, p. 112

- That the laboratory records show that the ionized calcium that is required for clotting was also depleted and that is clear evidence of ongoing disseminated intravascular coagulation. HR Vol. 3, p. 124

- That there is bruising on the head with no cause established but they are all extremely small which in his opinion is not blunt force trauma. That in his opinion the differential diagnosis for the bruising on the head range from accidental to nonaccidental as well as natural cause. HR Vol. 3, p 132

- That there are medical studies that indicate that a child does not immediately crash when an impact is received. HR Vol. 3, p. 133-135

- That autopsy photographs reveal a perimortem injury present that is an oval shaped red area on the back of the head that earlier photographs of the child taken at hospital do not show. HR Vol. 3, p. 132

Dr. Robert Sunderland

That the Court finds that Dr. Robert Sunderland testified as follows at the habeas hearing:

- That his professional address is Birmingham Children's Hospital, Birmingham, England. HR Vol. 5, p. 180

- That he has a bachelor of medicine and a bachelor of surgery and is a fellow for the Royal College of Physicians in London. He also is a fellow for the Royal College of Pediatrics and Child Health in London. HR Vol. 5, p. 180

- That he is a member of the faculty of Forensics and Legal Medicine in London. HR Vol. 5, p. 180

- That he earned a Doctorate of Medicine from the University of Edinburgh by thesis. HR Vol. 5, p. 181

- That he received specialist training in pediatrics, pathology and pediatric pathology at University of Sheffield. He is now a senior clinician at the University of Birmingham. HR Vol. 5, p. 180-182

- That his practice involves treating children brought in to the casualty emergency department and he also runs outpatient clinics. HR Vol. 5, p 182

- That in this case he reviewed clinical laboratory records, hospital records and photographs. HR Vol. 5, p 184-185

- That he was initially struck by the serious derangement of the coagulation, the abnormal liver enzymes, and other evidence of clotting and abnormalities shown in the early blood tests. HR Vol. 5, p. 185

- That as to the coagulopathy he noticed that the partial thromboplastin time (PTT) is over 200 seconds but protothrombin time is 26 seconds. Also, fibrinogen levels were very low. In his opinion these finding indicate that something is going wrong with this child's coagulopathy. HR Vol. 5, p 185- 187

- That what is very glaring is that the child's albumin, an ordinary protein in the blood, is low which means that it has been leaking for some reason and it takes days to leak. HR Vol. 5, p 187

- That the records reveal that the liver enzymes are raised which means a damaged liver. In his opinion the child's liver was pumping through the rubbish that was coming in from somewhere else rather than the liver itself being sick. HR Vol. 5, p 188-191

- That he speculates that the child was sick for some two to three days, maybe four to five days beforehand. HR Vol. 5, p. 194

- That the presence of a fractured clavicle means there was trauma but does not explain the deranged laboratory tests. HR Vol. 5, p. 229

- That the bleeding of the mouth, kidney, bowel and genitals is not due to trauma but to a coagulopathy. p. 229-230

- That the bleeding of the genital was due to being touched either lewdly, cleaning or medically. HR Vol. 5, p. 230

- That if you pull apart the labia in a very sick child whose skin is friable you can get bleeding. HR Vol. 5,p. 230-231

- That his review of the photographs did not show any tear in the fourchette. A gape would be shown if it had been torn. HR Vol. 5, p. 231

- That the bleeding is actually in the fossa navicularis that is the area between the fourchette and the hymen. HR Vol. 5, p. 231

- That a blood clot is present between fourchette and hymen that means it had to have been there for some time because the clotting is deranged. HR Vol. 5, p. 232-233

- That what he viewed is a blood clot, not fresh blood, because it is shining when photograph taken. Fresh blood would be matte. HR Vol. 5, p. 237

- That what he viewed is not consistent with sexual assault because there is no bruising, no abrasion and no sign of damage on the outside of the child. HR Vol. 5, p. 234

- That a girl of six months who has been sexually assaulted will have a tear that goes right back and there was no sign of a tear on the outside or between the vestibule and the anus. HR Vol. 5, p. 235

- That a coagulopathy was present and the gentlest touching whether with a Q-tip or cleaning can cause bleeding. HR Vol. 5, p. 238-239

- That the history from caregivers that child unwell, feverish, not feeding, having blood in the urine, blood in the stool, consistent with lab tests. HR Vol. 5, p. 252

- That her condition continues up to the point of her death because her clotting is never quite normal. Her blood count and hemoglobin keep falling despite appropriate treatment. HR Vol. 5, p. 253

- That the reports indicating that the nurses noticed blood when they went to insert the catheter is medically consistent with the child being unwell for two or three days before the final collapse. HR Vol. 5, p. 269-270

- That the low albumin count is a warning that the child has been burning up her clotting factors and indicates that she has been sick for some time. HR Vol. 5, p. 307

- That in his opinion the genital area has been touched in a child who has already got a bleeding disorder. HR Vol. 5, p. 320

Dr. Waney Marian Valarie Squier

The Court finds that Dr. Waney Squier testified at the habeas hearing as follows:

- That she is a neuropathologist employed at the John Radcliffe Hospital in Oxford, England doing diagnostic neuropathology for the national health service. HR Vol. 6, p. 7

- That pursuant to an honorary contract with the university of Oxford she is involved in diagnostic work, teaches and does research. HR Vol. 6, p. 7

- That she is a member of British Neuropathological Society, French Neuropathological Society and British Pediatric Neurologist Association. HR Vol. 6, p. 7

- That she received her bachelor of science degree in anatomy at the University of Leeds. She received her bachelor of

medicine and science, MB ChB and bachelor of surgery. HR Vol. 6, p. 9

- That she became a member of the Royal College of Physicians by examination in pediatrics and obtained fellowship at the Royal College of Pathologists in 1991. HR Vol. 6, p. 9

- That she has authored many articles in the area of acquired brain injury in infants and young children. HR Vol. 6, p. 9

- That she lectures thought the world in the area of pediatric neuropathology. HR Vol. 6, p. 10

- That the area of pediatric neuropathology is the study of what can go wrong with brain, the spinal cord and the muscles and to attempt to make diagnoses of the diseases of the central nervous system. HR Vol. 6, p. 10

- That she relied on hospital records, clinical notes and history in arriving at her opinion. HR Vol. 6, p. 12-18

- That the records of the child's doctor visit on Oct 12th are significant because the doctor had concerns regarding her growth and noticed candida diaper rash. HR Vol. 6, 13-14

- That the CT brain scan describes subarachnoid bleeding in various parts of the brain and cerebral edema meaning there is brain swelling which all hints that there is some hypoxic ischemic injury. HR Vol. 6, p. 19

- That there are no contusions or subdural bleeding identified on the first brain scan. HR Vol. 6, p. 20

- That the post-mortem report reflected that brain weighed 100 grams more than it should for a child of this age that suggests brain swelling. HR Vol. 6, p. 20

- That at the only subscapular hemorrhage is the posterior occipital region of the head or middle back of the head that is commonly seen in children hooked up to a ventilator. In this situation blood drains to the back of the brain or the back of the head where the child's head is in contact with the mattress. In other words this hemorrhage is secondary to the period of ventilation. HR Vol. 6, p. 21

- That bridging veins are responsible for draining blood from the brain into the sinus. No record of bridging veins being examined to determine whether they were torn which is important in a shaking case because if you shake a baby and is subjected to severe impact then the bridging veins can be torn. HR Vol. 6, p. 26

- That you can't conclude subdural bleeding without determining whether bridging veins are intact or not. HR Vol. 6, p. 27

- That her final impression from what she reviewed was a picture of a brain suffering from deprivation of blood and oxygen supply and "no evidence of any trauma in the brain whatsoever." HR Vol. 6, p. 34

- That there is some indication of subdural bleeding a couple of weeks before event but cannot make that conclusion with additional stains. HR Vol. 6, p 34-35

- That she agreed with reports of Dr. Dolinak and Dr. White. HR Vol. 6, p. 34

- That what State's witness Dr. Wilson described as a "contusion" is not a contusion but leaking of blood from blood vessels. HR Vol. 6, p. 37

- That historical information gleaned from records indicates that the baby was ill in the 24 hours before she was admitted. HR Vol. 6, p. 49
- The she agrees that trauma is a cause of subdural hemorrhage but there are now birth related causes such as thrombosis of the sinus, aneurysms that rupture, coagulaopathies and rare metabolic disorders and more recent information shows that hypoxia itself may also cause subdural hemorrhage. HR Vol. 6, p. 52

- That a 2008 study showed that traumatic injury in young infants is extremely rare. This supports findings in this case. In the absence of stretching and tearing of the nerve fibers in the brain a diagnosis of shaken baby syndrome is not supported. HR Vol. 6, p. 68

- That a 1988 study by Tina Duhaime concludes that all babies they studied who had shaken baby syndrome when they came to autopsy had evidence of fractures and bruises. Further that shaking was 50 times less force than impact. HR Vol. 6, p.69

- That it is crucial in a case of this type to look for a list of differential diagnoses that would include natural, intentional and accidental causes. The most common is either an inflicted impact or from a fall or an accident. HR Vol. 6, p. 70

- That second the most common cause is the existence of a chronic subdural hemorrhage. The third groups of most common causes include ruptured aneurysms,malformations, metabolic diseases, coagulopathies, asphyxia and hypoxic ischemic injury. p. 70-71

- That in this case the child had retinal hemorrhage and brain swelling but no evidence of subdural hemorrhage on the first scan but the 30 minutes of hypoxia "would explain everything." HR Vol. 6, p. 71

- No indication from brain slides, CAT scans or other medical records that the child died from head trauma. HR Vol. 6, p. 73

- Timing of the bruises would be significant evidence in determining the nature of the trauma present. HR Vol. 6, p. 74

- That the kind of trauma present is probably too soon and not sufficiently severe to account for the kind of clotting problems that were seen. p. 79

- That there is no doubt in her mind that the child suffered from a coagulopathy. HR Vol. 6, p 149

Dr. Richard Matthew Soderstrom

The Court finds that Dr. Richard Matthew Soderstrom testified at the habeas hearing as follows:

- That he is Board Certified Obstetrician and Gynecologist that he has held since 1967. HR Vol. 9, p. 164

- That he is presently retired but when he practiced his primary practice was in Seattle, Washington from 1963-1999. HR Vol. 9, p. 164

- That he served as director of endoscopy at Swedish Hospital Medical Center and director of the residency program University of Washington at Virginia Mason. Medical Center. He also holds a Professor Emeritus, University of Washington School of Medicine. HR Vol. 9, p. 164-165

- That he has an undergraduate degree from Stanford University and his medical education at Northwestern University. HR Vol. 9, 165

- That he completed his internship and residency in Seattle, Washington at the Swedish Hospital. HR Vol. 9, 165

- That he practiced his specialty in the United States Air Force and then practiced medicine for 20 years in Seattle at the Mason Clinic. HR Vol. 9, p. 165

- That he founded the Association of Gynecology Laparoscopy in 1972. HR Vol. 9, p.

- That early in his practice he became involved in an optical instrument known as the laparoscope which is commonly used today to do intra-abdominal surgery. HR Vol. 9, p. 165

- That he became head consultant to the FDA on the laparoscope. He also became involved with another optical instrument call the colposcope. HR Vol. 9, p. 166
- That the laparoscope is a device that is commonly used for intra-abdominal surgery. HR Vol. 9, p. 165

- That a colposcope is an optically developed pair of binoculars that allows magnification and is used for examining female patients and surgery. HR Vol. 9, p. 168

- That he reviewed photographs of the deceased child. HR Vol. 9, p. 170-171

- That the standard treatise as far as documented photographs of known and unknown sexual abuse is the Color Atlas of Child Sexual Abuse published in 1989. HR Vol. 9, p. 173-174

- That when you take a picture of blood with a flash blood does not reflect light back but absorbs it. HR Vol. 9, p. 179

- That based on review of photograph marked and admitted as Petitioner's Exhibit 15 there is no evidence within a clinical reasonable certainty of sexual abuse. No indication of ripping or tearing. HR Vol. 9, p. 184-186

- That there was no photograph of the 33 he reviewed that evidenced sexual assault. HR Vol. 9, p. 190

- That his review of photographs revealed no laceration. HR Vol. 9, p. 194

- That nothing in the photographs evidences with reasonable medical probability that a finger, a pencil or a candle created any damage to the area. HR Vol. 9, p. 209

- That subjective measurement of relevant genital area at issue is misleading. Pathologist's assertion that laceration is half an inch in size is inaccurate based on autopsy photos. HR Vol. 9, p. 245-246

Dr. John Plunkett

The Court finds that Dr. John Plunkett testified at the habeas hearing as follows:

- That he is a self employed consultant, researcher and teacher in the area of infant injury evaluation. HR Vol. 10, p. 60

- That he is medical doctor specifically a general and forensic pathologist. HR Vol. 10, p. 60

- That he attained his medical degree from the University of Minnesota Medical School. He completed a one year rotating or general internship at St. Paul-Ramsey Hospital. HR Vol. 10, p. 61

- That he undertook an additional five years of training, four in general pathology, and one in forensic pathology and he is Board certified in anatomic, clinical and forensic pathology. HR Vol. 10, p. 62

- That he has a special interest in infant injury evaluation in particular infant head injury evaluation and an area upon which he has written peer reviewed literature. HR Vol. 10, p. 62-63

- That he reviewed medical records, police records, pathologic slides and photographs. HR Vol. 10, p. 64

- That his conclusion beyond a reasonable medical certainty is that the child's cause of death is widely disseminated infection or sepsis. HR Vol. 10, p. 64-65

- That there is no evidence that child died of shaking. HR Vol. 10, p. 65

- That regarding whether the child was sexually assaulted he formed the opinion that child was not sexually assaulted. HR Vol. 10, p. 66

- That child had small subdural hematoma of insufficient volume in and of itself to cause problems. HR Vol. 10, p. 72-73

- That the child had subarachnoid hemorrhage that is common from brain swelling but does not indicate what occurred to cause the child to die. HR Vol. 10, p. 73-74

- That the child had retinal hemorrhage that can result of intracranial pressure but was not caused by shaking. HR Vol. 10, p. 75

- That the child had no evidence of blunt force trauma except for a couple of contusions or bruises right at the top part the head which he couldn't say whether they are impact injuries. HR Vol. 10, p. 78

- That records showing PTT or prothombin time and fibrinogen levels indicate that child had coagulopathy. HR Vol. 10, p. 83-84

- That coagulopathy can be caused by major trauma or widespread infection. There was no evidence of major trauma to this child but there was evidence of widespread infection. HR Vol. 10, p. 84-86

- That this is not a shaken baby case because you can't cause brain damage by shaking without first causing major structural damage. HR Vol. 10, p. 88-89

- That he disagrees with experts that say that shaken baby syndrome will not result in cervical or neck injury. HR Vol. 10, p. 89

- That in order to cause brain injury from shaking in a 6 month old, 12 pound infant, major structural neck damage will result to the extent of decapitation. Decapitation meaning that the cervical vertebrae will separate. HR Vol. 10, p. 91

- That the large mark at the top of the head could be interpreted as evidence of blunt force trauma that could cause brain damage but in view of her clinical history of illness prior to admission, the consumption coagulopathy and the widespread pneumonia there is no need to speculate about the head impact injury. HR Vol. 10, p. 92-93

- That review of Petitioner's Exhibit 15 shows no evidence of sexual assault of the child. HR Vol. 10, p. 93-94

- That review of that particular photograph reveals granulation tissue that is the result of an infection. HR Vol. 10, p. 95

- That a laceration couldn't have been a half an inch in size because on a child of this size there is not enough room. HR Vol. 10, p.96-97

- That a review of the slide of microscopic portion of skin from posterior fourchette appears to be granulation tissue that had been there for at least three or four days. HR Vol. 10, p. 97

- That penetration or attempted penetration of child of this size, be it either a penis or finger, one would expect to see tearing and bruising. HR Vol. 10, p. 105-106

Affidavit of Dr. Edward N. Willey

The Court finds that Dr. Edward N. Willey's affidavit was filed and the following is a summary of some the relevant evidence he gave:

- That he is a medical doctor and earned is medical degree from the University of Michigan and is certified by the American Board of Pathology in Anatomical Pathology.

- That in arriving at his conclusions in this case he has reviewed the transcript of the habeas hearing, witness affidavits, expert affidavits, medical records, investigative reports, transcripts of witnesses at the trial and photographs.

- That it is critical that in distinguishing between abuse and other explanations for a lesion that sizes and locations of structures and lesions be understood.

- That genital tissue in a child of this size and age are fragile and tear easily, even with medical examination if not done with care.

- That review of the photographs taken after hospital admission show no active bleeding, no tears of the hymen, and no damage to the vagina.

- That the area of the alleged injury is a tiny lesion, either tissue disruption or a blood clot, 1/5 of an inch in size.

- That in a child this size insertion of a finger or penis would cause serious damage to the child's genitals and such damage was not present.

- That Dr. McClain's autopsy drawing and her claim of a 1/2 inch vertical laceration is erroneous and misleading because

her drawing was made on an adult diagram. The photographs confirm this conclusion.

- That since the child's anatomy is entirely normal, except for the lesion 1/5 inch in size, Nurse Gorday's opinion that the child, if she had lived, would need surgical repair makes no sense.

- That the sexual assault photographs show a small abnormality, likely inflammation or infection in the vestibule that is chronic, at least days old and not very recent.

- That review of the pathology slide confirmed old, chronic, not acute inflammation in the area of the lesion and no laceration.
- That E-coli bacteria cultured from the urine confirmed urinary tract infection likely caused by stool contamination.

- That caretaker reports of cleaning black sticky stool in the vaginal area suggest gastrointestinal bleeding.

- That E-coli and Klebsiella pneumonia and highly abnormal laboratory tests suggest sepsis, the most common cause of coagulopathy by disseminated intravascular coagulation (DIC).

- That the small lesion in the sexual photographs is consistent with being caused by abrasion with cleaning

- That review of the photographs and the description of cleaning stool from the area of the vestibule by the Lopez'

leads to the possibility that they may have touched the existing infection with a fingernail causing the lesion.

- That the child's coagulation disorder makes it unlikely that the lesion was caused only shortly before the hospital admission.

Affidavit of Dr. Patrick D. Barnes

The Court finds that Dr. Patrick D. Barnes gave evidence by affidavit and supplemental affidavit as follows:

- That he is a medical doctor serving as Professor of Radiology at Stanford University Medical Center and Chief Pediatric Neuroradiology and Medical Director of the MRI/CT Center at Lucile Salter Packard Children's Hospital.

- That he has 30 years experience in his practice and teaching on head injury in children.

- That he has published numerous articles and reviews on the subject of pediatric head injury.

- As a pediatric neurologist he uses images and technologies to diagnose conditions of the brain and spinal cord in children.

- In determining between trauma (accidental or non-accidental) and natural causes it is important to correlate caretaker reports, laboratory tests, pediatric record, hospital records, investigator reports and autopsy findings.

- That in this case after conducting review of radiology images and medical records there is no evidence of abusive head

injury occurring shortly before hospital admission but does find evidence of significant illness or injury that was ongoing for several days before admission that would explain the child's collapse.

- That a review of the CT Scan of October 28, 2000 there is a small right-sided hemorrhage, most likely 3 hours to 10 days old, that is small and nonspecific for cause. This would not explain the child's death.
- That the CT shows recent widespread cerebral edema that is nonspecific and consistent with a 30 minute downtime before resuscitation

- That the CT indicates no specific indicators of trauma such as skull fractures, shear injuries or neck injury.

- That review of the medical records revealed relevant factors such as reports of caretakers, lab reports indicating a coagulopathy, treatments in days before admission and a 30 minute downtime before resuscitation followed by 42 hours on life support.

- That the CT findings are consistent with the child's symptoms suggesting natural causes for her collapse.

- That subarachnoid hemorrhages occur from many causes other than trauma and in this case the hemorrhage could have occurred up to ten days before hospitalization.

- That the presence of edema (brain swelling) does not suggest a cause of death but simply reflects the impact of oxygen deprivation for a sustained period.

- That there is no evidence of "mechanical injury" as testified to by Dr. Alexander instead the small amount of bleeding around the brain is due to lack of oxygen to the brain.

- That laboratory tests after admission to hospital showing PTT level of 212 established coagulopathy.
- That laboratory tests confirming E coli from the urine and Klebsiella pneumonia confirm infection from pathogens normally found in stool and consistent with pre-admission symptoms that were reported.

- That reports of the child's lethargy the days before admission are consistent with pneumonia, sepsis, hypoxia-ischemia and other illnesses and infections.

- That differential diagnosis for retinal hemorrhage includes vitamin deficiencies and coagulopathy and is consistent with the increased intracranial pressure caused by brain swelling following a 30-minute downtime, resuscitation and life support.

- That in his opinion the medical records contain no evidence of head injury but if you accept the fact that there was shaking or impact then based on studies the most likely time frame for infliction of the injury would have been the period shortly before the child's arrival at the Lopez home.

- That Gilliland study found that severe symptoms from shaking or shaking/impact might not occur for 72 hours or more from the event.

- That the key is not when the collapse occurs but when the symptoms begin.

Affidavit of Dr. Michael Laposata

The Court finds that Dr. Michael Laposata provided the following evidence by affidavit:

- That he is a Professor of Pathology and Medicine at Vanderbilt University School of Medicine and is an expert in coagulation, an area in which he teaches and publishes regularly.
- That it is easy for clinicians to mistake bruising and bleeding for abuse when actually a coagulapathy is the cause.
- That he reviewed laboratory tests information of Isis Vas and concludes from the PTT, PT, and fibrogin levels that the child had a serious coagulopathy (bleeding disorder) shortly after hospital admission.
- That blood tests reflecting albumin, AST/SGOT AND ALT/SGPT levels show that the coagulopathy was present for several days before hospital admission.

CONCLUSIONS OF LAW – ACTUAL INNOCENCE

State's Evidence

1. Nurse Examiner Michelle Gorday (SANE) is qualified by education and experience to render an expert opinion in the area of sexual assault.

2. Nurse Examiner Michelle Gorday (SANE) has a sufficient basis upon which to render an expert opinion on whether a sexual assault occurred.

3. Nurse Examiner Michelle Gorday's (SANE) testimony is relevant, reliable and would assist a jury in determining whether a sexual assault occurred.

4. Dr. Eric Levy is qualified by education and experience to render an expert opinion in the area of whether a sexual assault occurred and the cause of death.

5. Dr. Eric Levy has a sufficient basis upon which to render an expert opinion on whether a sexual assault occurred and to cause of death.

6. Dr. Eric Levy's testimony is relevant, reliable and would assist a jury in determining whether a sexual assault occurred and the cause of death.

7. Dr. Joni McClain is qualified by education and experience to render an expert opinion in the area of cause of death.

8. Dr. Joni McClain has a sufficient basis upon which to render an expert opinion as to cause of death.

9. Dr. Joni McClain's testimony is relevant, reliable and would assist a jury in determining the cause of death.

Habeas (New) Evidence

10. Dr. Jan Edward Leestma is qualified by education and experience as a neuropathologist to render an expert opinion in the area of cause of death.

11. Dr. Jan Edward Leestma has a sufficient basis upon which to render an expert opinion as to cause of death.

12. Dr. Jan Edward Leestma's testimony is relevant, reliable and would assist a jury in determining the issue of cause of death.

13. Debbie Jenkins is qualified by education and experience as a Nurse Examiner (SANE) to render an expert opinion in the area of sexual assault.

14. Debbie Jenkins has a sufficient basis upon which to render an expert opinion as to sexual assault.

15. Debbie Jenkins' testimony is relevant, reliable and would assist a jury in determining whether a sexual assault occurred.

16. Debbie Jenkins is not qualified to render an opinion regarding medical diagnosis pertaining to bleeding disorders or systemic infection (sepsis).

17. Dr. Peter John Stephens is qualified to render an expert opinion based on his education and experience as a pathologist, in the area of cause of death but his review

of the photographs did not give him sufficient basis to testify as to sexual assault.

18. Dr. Peter John Stephens, from his review of the medical records, has a sufficient basis to render an opinion regarding cause of death.

19. Dr. Peter John Stephens' testimony regarding cause of death is relevant, reliable and would assist the jury in determining the issue.

20. Dr. Robert Sunderland is qualified by virtue of his education and experience as pediatric pathologist to render an expert opinion related to the child's medical condition prior to and during admission to the emergency room and the issue of sexual assault.

21. Dr. Robert Sunderland, from his review of the medical records, possesses a sufficient basis upon which to render his opinion regarding sexual assault.

22. Dr. Robert Sunderland's testimony is relevant, reliable and would assist a jury in determining the medical condition of the child prior to and during admission to the emergency room and to the issue of sexual assault.

23. Dr. Waney Squier is qualified to render an expert opinion based on her education and experience in the area of pediatric neuropathology.

24. Dr. Waney Squier's review of the medical records in this case provides her with a sufficient basis to render an expert opinion regarding the medical condition of the child relevant to the issue of the cause of death.

25. Dr. Waney Squier's testimony is relevant and reliable and would assist a jury in determining the cause of death.

26. Dr. Richard Soderstrom is qualified to render an expert opinion on the issue of sexual assault by virtue of his education and experience as an obstetrician and gynecologist

27. Dr. Richard Soderstrom's review of medical photographs taken in this case provide him with a sufficient basis to render an expert opinion in the area of sexual assault.

28. Dr. Richard Soderstrom's testimony is relevant and reliable would assist a jury in determining whether a sexual assault occurred.

29. Dr. John Plunkett is qualified to render an expert opinion in the area of sexual assault and cause of death based on his education and experience in the area of anatomic, clinical and forensic pathology.

30. Dr. John Plunkett's review of medical and investigative records provide him with sufficient basis to render an expert opinion as to the issues of sexual assault and cause of death.

31. Dr. John Plunkett's testimony is relevant and reliable and would assist the jury in determining whether a sexual assault occurred and the cause of death.

32. Dr. Edward N. Willey is qualified to render an expert opinion on the issue of sexual assault based on his education and experience as a pathologist.

33. Dr. Edward N. Willey's review of hearing transcripts, affidavits, medical records, investigative reports and photographs provide him with a sufficient basis to render an opinion on the medical condition of the child whether a sexual assault occurred.

34. Dr. Edward N. Willey's testimony would be relevant and reliable and would assist a jury in determining the medical condition of the child prior to and during admission to the emergency and whether a sexual assault occurred.

35. Dr. Patrick D. Barnes is qualified to render an expert opinion as to his radiological findings in this case based on his education and experience as a pediatric neuroradiologist.

36. Dr. Patrick D. Barnes' review of the radiological records, CT scan and medical records provides him with a sufficient basis to render an expert opinion regarding the child's medical condition prior to and during

admission to the emergency room that are relevant to the issues of sexual assault and cause of death.

37. Dr. Patrick D. Barnes' testimony would be relevant and reliable and would assist a jury in determining the medical condition of the child as it relates to the issue of whether a sexual assault occurred and the cause of the child's death.

38. Dr. Michael Laposata is qualified to render an expert opinion based on his education and experience as a pathologist particularly in the area of coagulation.

39. Dr. Michael Laposata's review of the laboratory reports provides him with sufficient basis to render an expert opinion regarding coagulation and its relation to the issues of sexual assault and to cause of death.

40. Dr. Michael Laposata's testimony would be relevant and reliable and would assist a jury in understanding the medical condition of the child as it relates to the issues of sexual assault and cause of death.

Final Conclusions (Actual Innocence)

1. This is a case of credible, hands on, eye ball expert witnesses versus credible expert witnesses who have rendered opinions based on medical reports, laboratory reports, autopsy reports, investigative reports, slides and photographs.

2. The State's experts have presented credible testimony on the issue of sexual assault and cause of death.

3. Petitioner's experts have presented credible testimony on the issue of sexual assault and cause of death

4. Petitioner's medical experts do not unquestionably establish his innocence in light of the State's trial evidence. Ex Parte Elizondo, 947 SW2d 202 (Tex. Crim. App. – 1996)

5. This is not a case where the habeas court can make a finding that one set of experts is more credible than the other.[4] *Wisconsin v. Edmunds*, 746 N.W.2d 590 (Wisconsin Court of Appeals – 2008)

6. A comparison of the old evidence (trial testimony of State's experts) with the newly discovered evidence (Petitioner's habeas experts) does not compel the conclusion that it is more likely than not that no reasonable juror would have voted to convict the Petitioner. *Ex Parte Reed*, 271 SW 3d 698 (Tex. Crim. App. – 2008)

7. Petitioner has failed to show by clear and convincing evidence that no rational jury would convict him in

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[4] The only exception is Dr. White because of his refusal to be cross-examined.

light of the new evidence. The Court is mindful of Petitioner's testimony and statements to law enforcement that he slapped and shook the child. *Ex Parte Elizondo*, 947 SW2d 202 (Tex. Crim. App. – 1996)

8. The habeas evidence is "newly discovered" because the evidence would have been presented to the jury but for defense counsel's deficient performance.

9. The habeas evidence is "newly discovered" based on ongoing debate and research in the medical community regarding "shaken baby syndrome" theory.

10. The habeas evidence presented establishes a reasonable probability that a different result would be reached in a new trial. *Ex Parte Elizondo*, 947 SW2d 202 (Tex. Crim. App. – 1996); *Wisconsin v. Edmunds*, 746 N.W.2 590 (Wisconsin Court of Appeals – 2008)

CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

PRELIMINARY DISCUSSION ON INEFFECTIVE ASSISTANCE OF COUNSEL

The standard for evaluating a claim of ineffective assistance of counsel is set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S. CT. 2052; 80 L. ED. 2D 674 (1984). There are two determinations to be made:

1. Whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and
2. Whether there is a reasonable probability that but for counsel's deficient performance, the result would have been different.

The instructions of Strickland allow counsel ample leeway to make reasonable tactical choices in providing a defense as long as the choices are reasonable and made after sufficient investigation of the law and the facts of the case. Upon review of counsel's performance, a strong presumption is indulged that the challenged performance meets acceptable professional standards and the burden is on the applicant to overcome that presumption

Defense counsel's strategic choices made after thorough investigation is virtually unchallengeable but strategic choices made after less than complete investigation are considered reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations.

If a determination is made that counsel's performance failed to meet professional standards then analysis must turn to whether in the absence of counsel's substandard performance there is a reasonable probability that the jury would have reached a different outcome. In other words the prejudicial impact of counsel's errors would have to be determined. The U.S. Supreme Court in **Strickland** defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

In considering Applicant's claims of ineffective assistance of trial counsel it is important to note that Applicant has asserted in his "Petition for Post-Conviction Relief Pursuant to Tex. Code

of Crim. Proc. Art. 11.07" ineffective assistance of counsel the following grounds:

1. Failure to Subpoena Medical Records
2. Failure to Review Records that Became Available
3. Failure to Obtain Expert Review
4. Failure to Familiarize Themselves with Medical Literature
5. Failure to Investigate Facts
6. General Lack of Preparation
7. Failure to Object
8. Inadequate Jury Voir Dire
9. Failure of Representation

The Court's discussion will focus on the main contention alleging deficient performance in defense counsel's failure to investigate, lack of preparation and failure to obtain medical experts during the trial.

Sources of Findings – Ineffective Assistance of Trial Counsel

In making findings on the issue of ineffective assistance of counsel at trial the following sources in the record were used:

- The trial record (TR) consisting of Volumes 1 through 9
- The habeas hearing testimony of Randy Don Wilson. HR Vol. 4, p. 100-158
- Affidavit and supplemental affidavit of Randy Don Wilson.
- Affidavit of Robert Udashen
- Habeas hearing testimony of R. Walton Weaver. HR Vol. 4, p.s. 6-97
- Affidavit of R. Walton Weaver, Vol. 27, Tab 148

- Affidavits, file contents and notes of David Isern. HR Vol. 18, p.s. Tab. 29, HR Vol. 19, HR Vol. 20. P.s. 706-1093, HR Vol. 21, HR Vol. 22, HR Vol. 23, Tab 184, HR Vol. 27, Tab 146, HR Vol. 28,
- Affidavits, file contents and notes of Joe Marr Wilson. HR Vol. 24, HR Vol. 25, HR. Vol. 27, Tab 147

Findings of Fact – Ineffective Assistance of Trial Counsel

The court makes the following findings:

1. David Isern was initially retained in October 2000 to represent Applicant on the case of Aggravated Sexual but later he and Joe Marr Wilson were appointed by the trial court to represent Applicant on the Aggravated Sexual Assault and Capital Murder.

2. David Isern and Joe Marr Wilson (hereinafter Defense Counsel) were well aware before the trial from their investigation of the facts that experts would be required to rebut DNA evidence, the evidence that a sexual assault had occurred and in the event of a conviction evidence of cause of death.

3. Defense counsel retained Dr. Elizabeth Johnson, a DNA expert, who advised Mr. Isern that they needed to retain a forensic pathologist.[5]

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[5] The main issue in this case is whether the injuries are the result of an intentional act or natural causes. The DNA evidence appears to play no significant part in resolving the issues.

4. Attorney Bill McKinney provided David Isern information regarding Forensic Pathologist Vincent DiMaio on or about September 2002 on the speculative nature of timing injuries.

5. Attorney R. Walton Weaver consistently advised David Isern of the need for an expert witness.

6. David Isern consistently communicated with co-counsel Joe Marr Wilson about the need of expert witnesses.

7. In March 2001 David Isern retained Dr. Lloyd White, forensic pathologist, to review the autopsy report and other investigative reports.

8. Dr. White provided a preliminary report April 2001 raising, among other matters, the issue of the speculative nature of timing injuries.

9. At the pre-trial conference held April 14, 2003,just prior to voir dire, defense counsel informed the court that they had spoken to several doctors and pathologist in the area of forensic rape exam but that none would commit to being qualified in the area except for Nurse Examiner Debbie Jenkins.

10. Debbie Jenkins was contacted April 13, 2003 (the day before trial) by the defense investigator.

11. After reviewing limited medical records and photographs Debbie Jenkins relayed information to the investigator that could provide evidence rebutting the State's evidence of sexual assault and timing of the injury.

12. Debbie Jenkins requested more information to confirm her opinion but was not provided until well after the when the habeas issues arose.

13. Defense Counsel did not subpoena or otherwise make arrangements for Nurse Examiner Jenkins to come to court to testify or act as a consulting expert.

14. Defense counsel requested leave of court to designate Nurse Examiner Jenkins late stating to the court that they were not aware if she would testify or act as a consulting expert until she had reviewed records even though the day before Nurse Examiner Jenkins had relayed her initial opinions to Defense Investigator Campos from records she had reviewed.

15. Joe Marr Wilson did not provide Nurse Examiner Jenkins additional medical records as he indicated he would during the pre-trial conference held April 14, 2003.

16. The trial court ruled that Nurse Examiner Jenkins could be used as a consulting expert and left open for consideration whether he would allow her to testify.

17. Defense Counsel did not thereafter request the Court to allow Nurse Examiner Jenkins to testify nor have her in court for consultation nor contact her in any way during the remaining trial.

18. Defense counsel made a decision not to subpoena or otherwise call Dr. White as a witness during the guilt innocence stage or punishment stage.

19. From the time of Dr. White's preliminary report in April 2001 to April 2003 on the eve of the punishment trial defense counsel admitted to the trial court during a pre-punishment pre-trial hearing that "we just kind of let him hang."

20. Defense counsel's decision to not call Dr, White as a witness was because of his reluctance to testify due to impending employment as a contract pathologist with Potter County.

21. From April 2001 to the commencement of trial in April 2003 Defense counsel made no meaningful or timely attempt to retain other experts on the issues of sexual assault or cause of death.

22. The Court finds defense counsel had two stated strategies: (a) they wanted to portray the Petitioner as one who would not commit such a crime, and (b) they did not want to risk alienating the jury by challenging the State's experts.

23. During the trial on guilt innocence defense counsel presented no expert witnesses to rebut the State's theory that the child was the victim of sexual assault.

24. During the punishment phase defense counsel presented no expert witness to rebut the State's theory of the cause of death of the child.

25. Defense counsel was aware prior to trial that the State intended to show that the trauma to the child's genitalia was the result of sexual assault.

26. Defense counsel was aware prior to trial or should have reasonably anticipated that the State would present evidence of the child's death at the punishment stage on the basis of "Shaken Baby Syndrome" theory and/or blunt force trauma. See *"State's Original Notices Under 37.07, Section 3(a) & (g) of the Texas Code of Criminal Procedure, and Rules of Evidence 404(b) and 609(f)*

27. In preparation for the trial defense counsel had notice that an expert would be required to rebut the State's Otheory of sexual assault.

28. In preparation for trial defense counsel was aware, in the event of conviction, that an expert would be required to rebut the State's theory of "Shaken Baby Syndrome" and/or blunt force trauma as the cause of death.

29. The trial court had ruled in an earlier pre trial that evidence tending to connect the victim's grandfather to the sexual assault findings was too remote.

30. Due to lack of investigation and/or understanding of the medical issues Defense counsel failed to provide the Court with relevant medical information that might have affected the Court's ruling on remoteness.

31. Other than a review of the medical records in the District Attorney's file, Defense Counsel made no effort to obtain copies of medical records until less than a month before trial when some records were obtained from Child Protective Services.

32. That Don R.(Randy) Wilson is qualified as a licensed lawyer specializing in criminal to render an expert opinion standards of representation of a client in a criminal case. HR Vol. 4, p.100-101

33. That Don R. (Randy) Wilson had a sufficient basis upon which to render an opinion regarding the representation of the Petitioner by attorneys David Isern and Joe Marr Wilson by virtue of reviewing voluminous documents in this case. HR Vol. 4, P. 103

34. That the testimony of Don R. (Randy) Wilson's testimony is relevant and reliable and assists the habeas court in

determining whether David Isern and Joe Marr Wilson were deficient in their representation of the Petitioner. HR Vol. 4, P. 103-154

35. That Don R. (Randy) Wilson has provided credible testimony establishing that Joe Marr Wilson and David Isern provided ineffective assistance of counsel. HR Vol. 4, P. 103-154

36. That Robert Udashen is qualified by education and experience as a licensed lawyer specializing in criminal to render an expert opinion on standards of representation of a client in a criminal case. *Affidavit of Robert Udashen*

37. That Robert Udashen had a sufficient basis upon which to render an opinion regarding the representation of the Petitioner by attorneys David Isern and Joe Marr Wilson by virtue of reviewing voluminous documents in this case. *Affidavit of Robert Udashen*

38. That the testimony of Robert Udashen is relevant and reliable and assists the habeas court in determining whether David Isern and Joe Marr Wilson were deficient in their representation of the Petitioner. *Affidavit of Robert Udashen*

39. That Robert Udashen has provided credible evidence in his affidavit establishing that Joe Marr Wilson and David Isern provided ineffective assistance of counsel.

CONCLUSIONS OF LAW - INEFFECTIVE OF ASSISTANCE OF TRIAL COUNSEL

1. Defense counsel's failure to fully investigate the medical issues surrounding the issue of whether a sexual assault had occurred was deficient performance.

2. Defense counsel's failure to fully investigate the cause of death of the child was deficient performance.

3. Defense counsel's failure to retain expert witnesses on sexual assault and cause of death was deficient performance.

4. Defense counsel's decision not to call Dr. White, though within the realm of a sound strategy due to the witness' reluctance to testify, did not relieve them of the duty to seek other experts in view of Dr. White's alert to counsel to problems with the State's theory.

5. Defense counsel's failure to retain any experts, other than Dr. White, prior to trial was deficient performance.

6. Defense counsel's failure to consult with Dr. White well in advance of trial to determine whether he would be used as a witness or to discover the reasons he could not be presented so that other experts could be retained was deficient performance.

7. Defense counsel's failure to contact Nurse Examiner Jenkins until the day before voir dire, was deficient performance.

8. The lack of a full investigation of the medical issues under the circumstances prevented defense counsel from making a reasonable strategic decision.

40. The strategies of portraying the Petitioner as one who would not commit such a crime and not wanting to risk alienating the jury by challenging the State's experts provided no reasonable justification for lack of or limited investigation of the medical issues and the failure to call defense experts.

9. Defense counsel's only strategy of portraying the applicant as the type of person who would not commit such a crime and the idea that calling defense experts would somehow alienate the jury are not reasonable decisions that make investigating the medical issues and retaining experts unnecessary under the circumstances of this case.

10. Defense counsel's decision to not retain or call expert medical witnesses to rebut the State's theory of sexual assault and cause of death was not the result of a strategy made after a complete investigation.

11. Applicant was prejudiced by defense counsel's deficient performance in failing to investigate the medical issues, failing to timely obtain medical records, failing to retain experts to review the medical information and by failing to call experts as witnesses or to have them available for consultation.

12. There is no evidence that any defense experts where present during the trial for consultation.

13. The actions and inactions of trial counsel as enumerated above fell below objective reasonable standards under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)

14. But for defense counsel's deficient performance there is a reasonable probability that the outcome would have been different at the guilt innocence stage of the trial. *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)

15. If the jury had been confronted with the uninvestigated evidence that the perceived injury to the genitalia of the child was not a laceration but inflammation the result of infection and therefore not sexual assault there is a

reasonable probability that the verdict would have been different. *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed2d 471 (2003)

16. If the jury had been presented with the uninvestigated evidence at the guilt innocence stage and had nevertheless convicted the Applicant of Aggravated Sexual Assault it cannot be said defense counsel's deficient performance in failing to investigate the cause of death and failing to retain experts as to cause of death caused prejudice at punishment because there is just as much a reasonable probability the jury could have assessed a stiff sentence for sexual assault of a six month old child even if they did not believe that he caused the death of the child. *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052, 80 L.Ed. 2d 674; (1984) *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L.Ed2d 471 (2003); *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)

CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Discussion of Claim of Ineffective Assistance of Appellate Counsel

Appellate performance by counsel is reviewed under the same two-prong test of *Strickland v. Washington, 466 U.S. 668, 80* L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *U.S. v. Williamson, 183 F. 3d 488 (5th Cir 1999)* It is not necessary for appellate counsel to raise every nonfrivolous claim on direct appeal in order to provide effective assistance, and in fact, the process of winnowing out weaker arguments on appeal is the hallmark of effective appellate

advocacy. *Monzo v. Edwards, 281 F.3d 568 (6th Cir. 2002).* Smith v. Murray, 477 U.S. 527 (1986)

Petitioner claims that appointed appellate counsel Richard Walton Weaver was deficient in his performance by failing to assign as a point of error on appeal that the trial court refused a "medical defense instruction" which he claims probably would have resulted in a different disposition by the appellate court had the issue been raised.

Sources of Finding – Ineffective Assistance of Appellate Counsel

In making its findings the habeas court reviewed and considered the habeas hearing testimony in HR Vol. 4, p.s.6-97, the affidavit of Richard Walton Weaver in HR Vol. 27, Tab 148 and the appellate record.

Findings on Claim of Ineffective Assistance of Appellate Counsel

The Court makes the following findings:

Medical Care Instruction

1. That Petitioner testified that he cleaned feces from the anal and genital area but did not expose the inner genital area as shown in the photographs shown during the trial. TR Vol. 7, p. 54-55

2. That The Honorable Judge John Board refused the defense request for a medical defense instruction indicating that evidence did not support granting such an instruction. TR Vol. 7, 165-167

3. That after Petitioner was convicted of Aggravated Sexual Assault R. Walton Weaver was appointed on April 25, 2003 to represent the defendant on appeal. HR Vol. 27: Tab 148 p. 2, AppR 147.

4. That R. Walton Weaver made a response affidavit to assertions that he was ineffective regarding his representation of Ernest Lopez II and it was admitted at the 2009 habeas corpus writ hearing. HR Vol. 27: Tab 148 p. 1, HR Vol. 10: 47-48

5. That R. Walton Weaver is an attorney licensed to practice law in Texas and New Mexico. HR Vol. 27: Tab 148 p. 1, HR Vol. 10: 47-48

6. That R. Walton Weaver is a licensed, respectively, in 1992 and 1993 and have continuously practiced law since that time. HR Vol. 27: Tab 148 p. 1, HR Vol. 10: 47-48

7. That R. Walton Weaver worked as a briefing attorney for the Seventh District Court of Appeals in Amarillo, an Assistant District Attorney in the 47th District Attorney's Office, rising to the chief felony prosecutor position in the 108th District Court in Potter County, Texas. HR Vol. 27: Tab 148 p. 1

8. That R. Walton Weaver has been appointed as a special prosecutor for Randall County, Texas. HR Vol. 27: Tab 148 p. 1

9. That R. Walton Weaver has represented hundreds of defendants charged with felonies, including many first degree felonies. HR Vol. 27: Tab 148 p. 1

10. That R. Walton Weaver has represented several defendants charged with capital murder and have represented one defendant through trial and sentencing. HR Vol. 27: Tab 148 p. 1

11. That R. Walton Weaver is statutorily qualified to represent a Texas capital murder defendant and anyone charged with a first degree felony. HR Vol. 27: Tab 148 p. 1

12. That R. Walton Weaver has been appointed on a number of appeals and have written more than One Hundred Twenty (120) appeals in his career as a defense attorney, which does not include the memorandums of law he wrote while serving as a briefing attorney on the Seventh Court of Appeals. HR Vol. 27: Tab 148 p. 1

13. That R. Walton Weaver has reviewed his file in this case. HR Vol. 27: Tab 148 p. 1

14. That R. Walton Weaver logically explained why the statutory medical care defense is inapplicable here. HR Vol. 27 Tab 148 p. 6-10

15. That R. Walton Weaver in several pages of his 2007 affidavit used the facts in the habeas corpus writ pleading that are written in a light most favorable to applicant, showed why the medical care defense did not apply in his opinion by reciting the applicable law, referenced statutory and case law, and applied the applicable law to the assumed facts favorable to applicant. HR Vol. 27: Tab 148 p. 6-10

16. That R. Walton Weaver rationally determined that a medical defense instruction would not be required if a suspect powders or applies medicine on the legs and buttocks and the alleged injury is elsewhere. HR Vol. 27: Tab 148 p. 9

17. That R. Walton Weaver logically showed that there was no referenced evidence that the medication itself could have caused the injury alleged at trial. HR Vol. 27: Tab 148 p. 6-10

18. That R. Walton Weaver reported that applicant is attempting to equate the changing of a diaper to "medical care" as it is defined in the statute by asserting that, if diapers are not changed or feces are left inside the child's vagina, a medical consequence could occur. HR Vol. 27: Tab 148 p. 10

19. That R. Walton Weaver reported that applicant also contends that if a medical consequence could occur, then the applicant was entitled to a medical care defense instruction for cleaning this vaginal area. HR Vol. 27: Tab 148 p. 10

20. That R. Walton Weaver's reasonable opinion is that something more than speculation must be presented to support a defensive jury issue and what might occur is insufficient, thus, this argument seems to be based upon multiple inferences. HR Vol. 27: Tab 148 p. 10

21. That R. Walton Weaver's reasonable conclusion is that the changing of a diaper and wiping stool (even in the vagina) is not alone sufficient to warrant a medical care defense instruction. HR Vol. 27: Tab 148 p. 10

22. That R. Walton Weaver recalled that the instant case was tried on the theory that the sexual organ injury was significant. HR Vol. 27: Tab 148 p. 10

23. That R. Walton Weaver recalled that the case was not tried on a theory that Ernest Lopez II sexually assaulted the baby by taking proper care of the child or by wiping the baby's sexual organ. HR Vol. 27: Tab 148 p. 10

24. That R. Walton Weaver recalled that the State did not argue that the alleged injury was caused by wiping the child with baby wipes or normal cleaning. HR Vol. 27: Tab 148 p. 10

25. That R. Walton Weaver recalled that there were no inappropriate objects used to clean the baby. HR Vol. 27: Tab 148 p. 10

26. That R. Walton Weaver did not recall any evidence that the baby starting crying when Ernest Lopez used his fingers to get stool off the baby. HR Vol. 27: Tab 148 p. 10

27. That R. Walton Weaver recalled that the Defense at trial urged that the applicant was an excellent caretaker of this child and other children. HR Vol. 27: Tab 148 p. 10

28. That R. Walton Weaver recalled that the defense theory claimed that Ernest Lopez II would not have harmed the baby or any baby. HR Vol. 27: Tab 148 p. 10

29. That R. Walton Weaver recalled that the State urged that the alleged injury was not accidental. HR Vol. 27: Tab 148 p. 10

30. That R. Walton Weaver's opinion under the record of this case as shown by the quoted statements in the writ and as quoted in his affidavit show that there was no

fact issue as to whether medical treatment caused the injury or assault. HR Vol. 27: Tab 148 p. 6-10

31. That R. Walton Weaver assumed that failing to have a point of error on the medical care defense was error, and still showed how the error was harmless. HR Vol. 27: Tab 148 p. 10-11

32. That R. Walton Weaver assumed that failing to have a point of error on the medical care defense was error, and rationally concluded that (1) the trial record shows that the error would have been harmless beyond a reasonable doubt; (2) under the instant record, the case was not tried on a theory that the wiping of the vaginal area or inside that area caused any damage to the child; and (3) the State did not argue that cleaning the child was equivalent to sexual assault. HR Vol. 27: Tab 148 p. 10-11

33. That R. Walton Weaver assumed that failing to have a point of error on the medical care defense was error, and recalled that the State argued that there was very recent tearing, bleeding, and sexual injuries. HR Vol. 27: Tab 148 p. 10-11

34. That R. Walton Weaver logically explained that he is not required to raise speculative and unsupported assertions on appeal. HR Vol. 27: Tab 148 p. 6

35. That R. Walton Weaver received no information from Joe Marr Wilson, David Isern, or Ted Campos that the medical professionals testified inaccurately, falsely, or recklessly, although they did disagree with their conclusions. HR Vol. 27: Tab 148 p. 2

36. That R. Walton Weaver reported that he spoke with David Isern at length concerning the case. Exhibit #4 to affidavit, HR Vol. 27: Tab 148 p. 2

37. That R. Walton Weaver informed the Lopezes that the most likely avenue of success would be to develop new information in a subsequent writ. See Exhibits #18 attached to Weaver Affidavit

38. That R. Walton Weaver explained to the Lopezes the writ process. Exhibit #18 attached to Weaver Affidavit, HR Vol. 27: Tab 148 p. 6

39. That R. Walton Weaver on appeal argued that a medical expert was necessary to refute the State's expert. HR Vol. 27: Tab 148 p. 6-7

40. That R. Walton Weaver reported that the Court of Appeals decided otherwise. HR Vol. 27: Tab 148 p. 6-7

41. That R Walton Weaver reasonably concluded that his experience is that trial attorneys who are accused of ineffective assistance of counsel can successfully address many of such assertions adequately by way of affidavit or explanation. HR Vol. 27: Tab 148 p. 6-7

Jury Misconduct

42. R. Walton Weaver polled the convicting jury concerning the case by with the assistance of Ted Campos. See Exhibits to affidavit #5-15, HR Vol. 27: Tab 148 p. 3

43. R. Walton Weaver reported that only four (4) jurors did not talk with Campos. HR Vol. 27: Tab 148 p. 3

44. Weaver reported most of the jurors polled felt that while Lopez was likeable/credible, the medical evidence convicted him. HR Vol. 27, Tab 148 p. 3

45. R. Walton Weaver reported that he did not receive any information from Ted Campos, Joe Marr Wilson or David Isern about juror/jury misconduct nor was R. Walton Weaver informed of juror misunderstandings. HR Vol. 27,Tab 148 p. 3

46. R. Walton Weaver reported that the jurors were advised that their decision must be unanimous and a jury being advised that a unanimous decision is required, is indeed

the law. HR Vol. 27 Tab 148, p. 3

47. R. Walton Weaver reported that he jurors who responded to the poll all stated they based their decision on the evidence, chiefly the medical evidence. HR Vol. 27 Tab 148 p. 3

48. R. Walton Weaver reported that he even the so-called last hold out for not guilty, Michael Gover, stated, "No, I thought he was innocent, but then the medical testimony changed my mind." Exhibit #6 Question 3, HR Vol. 27 Tab 148 p. 3

49. R. Walton Weaver reported that all the jurors seemed to have reached a decision based upon the evidence and not because of outside pressure or other influences. HR Vol. 27 Tab 148 p. 3

50. R. Walton Weaver reasonably concluded that without any additional research on the legal issues, it generally appears that most, if not all, information included in the juror affidavits filed by applicant would have been inadmissible at the new trial hearing. HR Vol. 27 Tab 148 p. 3

51. R. Walton Weaver reasonably concluded that a juror's misunderstanding of an instruction that caused her to believe that the jury could not be divided in its answers appears to be inadmissible. HR Vol. 27 Tab 148 p. 3

52. While R. Walton Weaver was concerned about this misunderstanding, he did not think that it had an impact on the juror's ability to discuss the evidence and reach a unanimous decision. HR Vol. 27 Tab 148 p. 3

53. R. Walton Weaver acknowledged the post-appeal and habeas corpus writ affidavits of jurors David Butler and Michael Gover and accurately concluded that he had to base his appellate decisions on their responses immediately after the trial. HR Vol. 27 Tab 148 p. 3

54. R. Walton Weaver reasonably recognized that he had to base his judgment on the statements of the jurors shortly after verdict. HR Vol. 27 Tab 148 p. 3

55. R. Walton Weaver rationally concluded that Michael Gover and David Butler very shortly after trial determined that applicant Ernest Lopez, II was guilty based upon the evidence presented in court. HR Vol 27 Tab 148 p. 3-6

56. R. Walton Weaver reasonably concluded from the polling data that outside information was not specifically relied upon or discussed during jury deliberations. HR Vol. 27: Tab 148 p. 3

57. R. Walton Weaver reasonably concluded one of the jurors may have known in his mind that the defendant was guilty

based upon the evidence presented in court as opposed to an outside source and no specific outside information was shared or reported to Weaver. HR Vol. 27: Tab 148 p. 6

58. R. Walton Weaver rationally determined that the allegation that a juror knew the defendant was guilty and the applicant's assertion that it was necessarily outside evidence is speculative and again does not necessarily follow logically. HR Vol. 27 Tab 148 p. 6

59. R. Walton Weaver reasonably determined that he had no evidence that one juror relied upon an outside source of information during his deliberation. (HR Vol. 27 Tab 148 p. 6

60. R. Walton Weaver logically explained that he was not required to raise speculative and unsupported assertions in a new trial motion. Tex. Code. Crim. Proc. art. 1.052. (providing for sanctions and a contempt remedy for certain improper pleadings). HR Vol. 27 Tab 148 p. 6

61. R. Walton Weaver logically explained that he is not required to raise speculative and unsupported assertions on appeal. HR Vol. 27 Tab 148 p. 6

62. R. Walton Weaver reported that applicant complains that the appellate counsel committed ineffective assistance of counsel because he should have alleged that the trial attorneys were ineffective based upon information he

could have learned from conversations that he could have had with Ernest Lopez II and his family before the reporter's record was filed. HR Vol. 27 Tab 148 p. 6

CONCLUSIONS OF LAW – INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

1. That R. Walton Weaver, as the appointed appellate attorney, analyzed this appealed case during that time period by reading the clerk and reporter's record.

2. That R. Walton Weaver rendered effective assistance by determining which points of error he needed to raise in order to put forth the best chance to secure reversible error. *Monzo v. Edwards, 281 F.3d 568 (6th Cir. 2002). Smith v. Murray*, 477 U.S. 527 (1986)

3. That R. Walton Weaver's decision to not raise the refusal to include the "medical care" defense instruction was based on reasonable professional judgment after careful review of the law and evidence and did not fall below standards required of appellate counsel.

4. Assuming that failing to raise the medical defense instruction issue on appeal was deficient performance Petitioner failed to show that in reasonable probability that the appellate decision would have been different. To do

that the appellate court would have to take the unlikely position that the medical defense instruction would have to be given in a situation where a caretaker causes penetration of the vagina incidental to clean and remove feces from a soiled child,.

5. R. Walton Weaver rendered effective assistance of counsel during the new trial period and on appeal. *Strickland v. Washington, 466 U.S. 668, 80* L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

6. The Court concludes that the trial court has a duty under both the Texas and Federal Constitutions to provide an appellant with the effective assistance of counsel on appeal. *Yates v. State*, 557 S.W.2d 115 (Tex. Crim. App. 1977); Guillory v. State, 557 S.W.2d 118 (Tex. Crim. App. 1977).

7. The Court concludes that defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

8. The Court concludes that the applicant did not establish both that R. Walton Weaver's appellate representation fell below an objective standard of reasonableness in various

matters or by failing to raise a medical care defense.

9. The Court concludes applicant failed to establish that he was prejudiced or harmed by the actions or inactions of appellate counsel R. Walton Weaver.

10. The Court concludes that it was a reasonable appellate strategy for Weaver to put forth those issues most likely to have success on appellant Lopez' appeal.

11. The Court concludes that R. Walton Weaver was not ineffective during the motion for new trial time frame.

12. The Court concludes that applicant failed to establish that there was a reasonable probability that if R. Walton Weaver had raised the medical care defense on appeal, the result of the appellate proceeding would have been different.

13. The Court concludes that applicant failed to show that the failure to raise a medical care defense on appeal was probably sufficient to undermine confidence in the outcome the appeal.

14. The Court concludes the appellate adversarial process functioned appropriately and produced a reliable result on appeal.

15. The Court alternatively concludes that a claim of ineffective assistance of appellate counsel claim on the failure to assert a point of error on a jury charge issue is not cognizable in this habeas court writ proceeding.

RECOMMENDATION ON PETITIONER'S HABEAS CLAIMS

1. Petitioner's claim of "actual innocence" should be **denied.**

2. Petitioner's claim of ineffective assistance of trial counsel should be **granted.**

3. Petitioner's claim of ineffective assistance of appellate counsel should be **denied.**

Signed this 1 day of September, 2010

Dick Alcala, Senior District Judge

773505

No. 44,365-01-B

Ex Parte	⎬	**In the 181st District Court**
	⎬	**of**
ERNEST LOPEZ	⎬	**Potter County, Texas**

AMENDED ORDER REGARDING DISTRIBUTION

The following distribution is ordered:

1. The original complete with the entire record shall be mailed to:

   - Honorable Louise Pearson, Clerk
     Court of Criminal Appeals
     Post Conviction Writ Section
     P.O. Box 12308, Capitol Station
     Austin, Texas 78711

2. A copy shall be mailed or delivered to each of:

   - Caroline Woodburn, District Clerk
     Potter County Courthouse
     P.O. Box 9570
     Amarillo, Texas 79101-9570

   - Randall Sims
     District Attorney, 47th District
     Potter County Courthouse

773506

501 S. Fillmore, Suite 5A,
Amarillo, Texas 79101

- Heather Kirkwood, Attorney
  4515 West Dravus St.
  Seattle, WA 98199

- William R. McKinney, Attorney
  3505 Olsen Blvd, Suite 212
  Amarillo, Tx 79109

SIGNED this 1 day of September, 2010.

Dick Alcala, Senior District Judge

FILED
CAROLINE WOODBURN
DISTRICT CLERK

2010 SEP -3 A 10:08

POLK COUNTY, TX

773567

BY_____ DEPUTY 98